United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

285

United States Court of Appeals
for the District of Columbia

No. 8903

FILED MAY 2 1948

Joseph W. Stewart
CLERK

G. HAROLD WAGNER, *Appellant,*

v.

HARRY B. MITCHELL, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
STATUTE INVOLVED	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT—	
Point I	7
Point II	8
CONCLUSION	12

CASES CITED.

Aetna Casualty and Surety Company v. Yeatts, 99 F. 2d 665	10
Columbia Broadcasting System v. United States, 316 U. S. 407	11
Doehler Metal Furniture Co. v. Warren, 76 Appeals D. C. 60, 129 F. (2d) 43	10
Euclid v. Ambler Realty Co., 372 U. S. 365	11
Pierce v. Society of Sisters, 268 U. S. 510, 45 Sup. Ct. Rep. 571	11
Proctor & Gamble v. Sherman, 2 F. (2d) 165	11
Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255, 44 Sup. Ct. Rep. 15	11
White v. Macy, 246 U. S. 606	11

STATUTES.

Act of Congress of August 2, 1939, as amended, July 19, 1940, 54 Stat. 767, 18 U. S. C. A. Section 61 L(a); District of Columbia Code, Title 11-306, 28 U. S. C. A., Section 308(a); and 28 U. S. C. A. Section 400	1
Constitution of the Commonwealth of Pennsylvania	8
Factual Campaign Information, by the Senate Library, (April 15, 1948, page 13)	7, 8
Opinion of the Attorney General of the United States	12
Rules of Civil Procedure, Rule 57, Declaratory Judgment, Rules of District Court of the United States for the District of Columbia, page 74	10

IN THE

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G. HAROLD WAGNER, *Appellant,*

v.

HARRY B. MITCHELL, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

STATUTE INVOLVED.

Act of Congress of August 2, 1939, as amended, July 19, 1940, 54 Stat. 767, commonly known as the Hatch Act, 18 U. S. C. A., Section 61 L.(a); District of Columbia Code, Title 11-306, 28 U. S. C. A. Section 308(a); and 28 U. S. C. A. Section 400.

JURISDICTIONAL STATEMENT.

The lower court has jurisdiction of a matter of this nature under Rule 57 of the United States District Court Rules:

RULE 57. DECLARATORY JUDGMENTS.

> "The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.*" (Italics ours)

STATEMENT OF THE CASE.

This case comes before this Court on appeal by G. Harold Wagner from a judgment of the lower court dismissing his complaint for an injunction and declaratory relief.

The appellant, G. Harold Wagner, is a citizen of the United States, residing at Penn Lake, Dennison Township, Luzerne County, Pennsylvania, and was the duly elected Treasurer of the Commonwealth of Pennsylvania, which position is not under any classified or unclassified Civil Service of either the United States Government or the Commonwealth of Pennsylvania.

The appellees, Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, are individuals found doing business and residents in the District of Columbia and acting as the United States Civil Service Commission.

The action in the lower Court was to enjoin the appellees, acting as members of the United States Civil Service Commission, from enforcing, threatening to enforce, or proceeding with charges filed against the appellant in this case, allegedly pursuant to Section 12(a) of the Act of Con-

gress of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, commonly known as the Hatch Act, 18 U. S. C. A. Section 61 L.(a) and for declaratory judgment of the invalidity of these provisions of law and regulations incorporated into these provisions, or promulgated by the aforesaid United States Civil Service Commission pursuant thereto.

The United States Civil Service Commission filed the following letter of charges against the appellant on the 28th day of April, 1944:

"UNITED STATES OF AMERICA

BEFORE THE UNITED STATES CIVIL SERVICE COMMISSION

LETTER OF CHARGES

Docket No. 139

In the Matter of

G. HAROLD WAGNER, State Treasurer of the State of Pennsylvania,

and

THE STATE OF PENNSYLVANIA

The United States Civil Service Commission being in receipt of information which warrants, under the provisions of Section 12 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61 l), hereinafter referred to as the Act, an investigation of the improper political activities of G. Harold Wagner, State Treasurer of the State of Pennsylvania, does hereby issue its Letter of Charges setting forth a summary of alleged violations, all of which occurred in the State of Pennsylvania.

Wherever the term 'political party' appears in this Letter of Charges said term 'political party' means a political party whose candidates for presidential electors received votes in the last preceding election at which presidential electors were selected. Wherever the term 'political campaign' is used in this Letter of Charges, said term 'political campaign' means the political campaign in the primary and general elections of a political party as described in the preceding sen-

tence, unless otherwise stated. Wherever the term 'political management' is used in this Letter of Charges, said term 'political management' means the management of the activities of a political party as defined above, unless otherwise stated.

Wherever the term 'employees subject to the Act' is used in this Letter of Charges, said term 'employees subject to the Act' means persons employed by the State of Pennsylvania whose principal employment was at the time of the violation in connection with an activity of the State of Pennsylvania, financed in whole or in part by loans and grants made by the United States and by a Federal agency.

It is charged:

I

That at all times herein mentioned the said G. Harold Wagner was the State Treasurer of the State of Pennsylvania and as such his principal employment with the State of Pennsylvania was in connection with state activities financed in whole and in part by loans and grants made by the United States and an agency thereof, and exercised functions in connection with such activities.

II

That subsequent to January 1, 1941, the said G. Harold Wagner did directly and indirectly advise, command, attempt to coerce, and did coerce, employees subject to the Act to contribute, lend, and pay a part of their salary and compensation to a person, agency, committee, organization, and party for political purposes.

III

That subsequent to January 1, 1941, G. Harold Wagner used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsylvania, in the year 1944, in that he influenced employees subject to the Act and subordinate to him to aid and abet in said election by causing said employees to engage in political activity during office

hours and after office hours in furtherance of his campaign for nomination to the office of Auditor-General of the State of Pennsylvania.

IV

That subsequent to January 1, 1941, the said G. Harold Wagner used his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club who are employees of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomination and election as candidates of the Democratic Party.

"All of which is in violation of Section 12 (a) and Section 15 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61).

WHEREFORE, the United States Civil Service Commission on this 28th day of April, 1944, issues this, its Letter of Charges, against G. Harold Wagner and the State of Pennsylvania.

THE UNITED STATES CIVIL SERVICE COMMISSION
(Sgd.) ALFRED KLEIN
Alfred Klein
(Seal) *Acting Chief Law Officer.*"

The appellees filed in answer to the complaint a notice of Motions and Motion to dismiss and for summary judgment alleging that the Court lacks jurisdiction and a Motion for summary judgment in favor of the appellees on the ground that there are no genuine issues as to any material fact.

SUMMARY OF ARGUMENT.

The appellant at the time the Letter of Charges above referred to were issued against him on April 28, 1944, by the United States Civil Service Commission, was the duly elected Treasurer of the Commonwealth of Pennsylvania, having been elected to that office at the General Election

held in the State of Pennsylvania in November of the year 1940, and he is not subject to the provisions of the Act of Congress of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, U. S. Code, Title 18, Sec. 61.

That the principal employment of your appellant with the Commonwealth of Pennsylvania was not in connection with State activities financed in whole or in part by loans or grants made by the United States Government or any agency thereof. That the appellant is not under any classified or unclassified Civil Service of either the United States Government or the Commonwealth of Pennsylvania.

That the appellant is charged with a violation of Section 12(a) of the Hatch Act, 18 U. S. C. A. Section 61, L.(a), which provides as follows:

> "No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

The penalty provisions of the Hatch Act could not be enforced against the appellant since the State of Pennsylvania could not remove the appellant from office according to the requirements of the Hatch Act nor could the State be required to pay the penalty as provided by the provisions of said Act because of its inability to remove this elected officer.

ARGUMENT.

Point I.

That the appellant at the time of the charges filed against him by the Civil Service Commission in that he violated Section 12(a) of the Hatch Act, was the duly elected Treasurer of the State of Pennsylvania, having been elected to said office at the General Election held in the State of Pennsylvania in November of 1940, and having been elected by the people of said State, he is not subject to the provisions of the Hatch Act as alleged by the appellees.

See *Factual Campaign Information* compiled by the Senate Library, a summary of provisions relating to contributions under the Hatch Act, which states that Section 12 "prohibits the use of official authority or influence for the purpose of interfering with an election or a nomination for office or effecting the result thereof, by any officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency. It also prohibits direct or indirect coercion, attempted coercion, command or advice by any such officer to any other such officer or employee to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purpose."

[NOTE.—The term "officer or employee" as used in this section does not include the governor or lieutenant governor of any State, or any person authorized by law to act as governor, or the mayor of any city or duly elected heads

of executive departments of any State or Municipality who are not under classified Civil Service System or officers holding elective offices. This section is an administrative section for which there is no criminal penalty. Removal from office is the only personal penalty provided] (See "Factual Campaign Information", by the Senate Library, April 15, 1948, page 13).

The appellant, therefore, being the duly elected head of an executive department of a State avers that he is not subject to the provisions of the Act of Congress of August 2, 1939, as amended July 19, 1940, 54 Stat. 767 [Hatch Act] and that the United States Civil Service Commission are without jurisdiction to proceed against the appellant herein, since he is the duly elected State Treasurer of the Commonwealth of Pennsylvania, elected to that office at the General Election held in November of 1940 in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania, his duties were created and defined under the provisions of the Constitution of the Commonwealth of Pennsylvania and the Acts of Assembly promulgated thereunder.

See *Constitution of the Commonwealth of Pennsylvania.*

Point II.

The appellant, by virtue of his office as State Treasurer, is the custodian of all funds of the Commonwealth of Pennsylvania, as well as all funds received in the form of grants or loans to any agency of the Commonwealth of Pennsylvania from the Federal Government. Although there are approximately thirty (30) grants made annually to various State Agencies by the United States Government, or any of its agencies, none of these grants are made directly to the State Treasury Department. These Federal loans or grants are given instead to the various State departments, boards or commissions, of whose funds the State Treasurer is the custodian, as provided by the Constitution of the Commonwealth of Pennsylvania and the statutes enacted thereunder. However, in no instance does the State Treas-

urer have any right to determine how the grants given to these various State agencies should be disbursed, nor does he exercise any discretion in the manner in which they are to be disbursed. That authority and discretion lies solely within the power of the official or officer in charge of the State agency receiving the grant or loan. The function of the Treasurer in disbursing any portion of the monies received by these State Agencies is merely that of a conduit through whom the disbursement is made. His duties in this case are merely ministerial and circumscribed by statute. Congress in enacting Section 12 of the Hatch Act did not intend to cover an elected State officer performing this type of function.

Therefore, it is contended that since the State Treasurer exercises no discretionary or active functions in connection with the activity of an agency in the State of Pennsylvania, which is financed in whole or in part by loans or grants made by the Federal Government, it would follow that he comes within the exception contained in the provisions of Section 12 (c) (18 U. S. C. A. 61 l(e)) of the Hatch Act, which provides that—

> "The provisions of the first two sentences of subsection (a) of this section shall not apply to any officer or employee who exercises no functions in connection with any activity of a State or local agency which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency."

If the appellees are permitted to proceed with the alleged Letter of Charges filed against the appellant and a hearing held thereon, your appellant is without adequate remedy at law to determine preliminarily the right of the appellees to hold a hearing upon the charges which the appellant avers does not constitute a violation of Section 12(a) or any other section of the Hatch Act, and there exists no other adequate remedy at law whereby the appellant may protect his constitutional rights of which he would be deprived if the appellees herein, acting as the United

States Civil Service Commission, proceeded in accordance with the provisions set forth in Section 12(b), 18 U. S. C. A. Section 61 L.(b) of the Hatch Act, and carrying out their intention of holding the hearing on the Letter of Charges and the appellant will suffer irreparable damage in that he would have been adversely affected in his campaign as Democratic Nominee for the office of Auditor General, for which there is no adequate or complete remedy at law.

The Court does have jurisdiction and can grant the relief requested in the Complaint filed in the lower Court, on the well established principle that the existence of another adequate remedy does not foreclose the use of declaratory judgment where it is otherwise appropriate.

> *Doehler Metal Furniture Co.* v. *Warren,* 76 Appeals D. C. 60; 129 F. (2d) 43.

See *Aetna Casualty and Surety Company* v. *Yeatts,* 99 F. 2d) 665.

The procedure adopted by the appellant in filing his complaint for Injunction and Declaratory Relief is approved under Rule #57 of the Rules of Civil Procedure for the District Courts of the United States.

Said rule provides, *inter alia,* that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in causes where it is appropriate". The appellant under Rule #57 could invoke the provisions of Sections 380(a) and 400 of Title 28 U. S. C. A. since that procedure is appropriate in view of the irreparable damage that he would undoubtedly suffer. It is under these circumstances that a prescribed administrative remedy need not be exhausted before resort may be had to judicial relief for supposd threatened injury.

See *Rules of Civil Procedure,* Rule 57, Declaratory Judgment, Rules of District Court of the United States for the District of Columbia, page 74.

Courts will not require a futile exhaustion of administrative remedies as set forth in Section 12(c) of Title 18, U. S. C. A., as amended, before availing himself of the provisions of Section 380(a) and 400 of Title 28, U. S. C. A.

Proctor & Gamble v. *Sherman*, 2 F. (2d) 165;
Euclid v. *Ambler Realty Co.*, 372 U. S. 365;
Columbia Broadcasting System v. *United States*, 316 U. S. 407;
White v. *Macy*, 246 U. S. 606.

In case of a personal property rights and a threat to continue same, equity will prevail.

Terrace v. *Thompson*, 263 U. S. 197, 215, 68 L. Ed. 255, 274, 44 Sup. Ct. Rep. 15;
Pierce v. *Society of Sisters*, 268 U. S. 510, 535, 45 Sup. Ct. Rep. 571.

The appellant is not under any classified or unclassified Civil Service of either the United States or the State of Pennsylvania.

The office of the State Treasurer of the Commonwealth of Pennsylvania is provided for by the Constitution of the State of Pennsylvania and the duties of the said office are defined by statute. The manner of the election and the procedure for the removal from office are likewise provided for by statute. He can only be removed for malfeasance, nonfeasance or misfeasance in office by impeachment proceedings instituted by the General Assembly of the State of Pennsylvania. The executive branch of the State Government, or no other agency of the State Government, has the power to remove a person duly elected to the office of State Treasurer. Hence, it follows that, if admitted for the sake of argument only, that the charges as contained in the Letter of Charges could be sustained, there is no way under the Constitution and the Laws of the Commonwealth of Pennsylvania, whereby the United States Civil Service Commission could direct any State Officer or Agency, receiving Federal loans or grants, to remove the State Treasurer in accordance with the provisions of Section 12 (b) of the Hatch Act. (18 U. S. C. A. 61 l (b).)

The debate in Congress on the Hatch Act, expressly states that the legislators exempted elective officers from the Hatch Act.

Congressional Record, 76th Congress, 3rd Session, p. 2342:

> "Mr. Hatch: Elective officers are expressly exempt."

The opinion of the Attorney General of the United States:

> "Political activities by State or local employees." February 3, 1942.
>
> * * *
>
> "* * * The purpose of Section 12 is to prevent officers or employees of State or local agencies from engaging in any of the political activities mentioned therein while *their compensation is being paid in whole or in part from funds furnished by the Federal Government*" (italics supplied).

The United States Civil Service Commission's action in this case is premature in their desire to hold hearings and should be restrained until such time as the courts determine its jurisdiction as to such a duly elected state official and to proceed with the alleged Letter of Charges and hold a hearing thereon, he is without an adequate remedy at law to determine preliminarily the right of the appellees to hold a hearing upon charges the appellant avers do not constitute a violation of Section 12(a) of the Hatch Act since that section expressly excludes elected public officers from the operation thereof.

CONCLUSION.

It is, therefore, respectfully submitted that the Court had jurisdiction to determine whether the appellant is subject to the provisions of the Hatch Act, and that this Court reverse the action of the lower court.

CLEMENT REAP,
THOMAS A. FARRELL,
Attorneys for Appellant.

Dated May 25, 1948.

APPENDIX

INDEX TO JOINT APPENDIX.

	Page
Complaint for Injunction and for Declaratory Relief..	2
Exhibit A: Letter of Charges	10
Injunction Affidavit of G. Harold Wagner.....	12
Injunction Affidavit of Nelson A. Bryan	14
Notice of Motions and Motions to Dismiss and for Summary Judgment	16
Affidavit of Lawson A. Moyer in Support of Motion	17
Exhibit I: Letter of Charges	20
Exhibit II: Answer to Letter of Charges	23
Exhibit III: Letter of June 7, 1944, William C. Hull to Congressman Francis E. Walter	26
Exhibit IV: Notice of Hearing	27
Order Granting Motion to Dismiss Complaint	28

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 8903.

G. HAROLD WAGNER, *Appellant,*

v.

HARRY B. MITCHELL, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

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1 Filed Aug. 30, 1944

In the District Court of the United States for the District of Columbia

Civil Action No. 25759

G. HAROLD WAGNER, Penn Lake, White Haven, Pennsylvania, *Plaintiff*

v.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN and ARTHUR S. FLEMMING, *Defendants*

Complaint for Injunction and for Declaratory Relief

To the Honorable Justices of the District Court of the United States for the District of Columbia:

This is an action to enjoin defendants, acting as members of the United States Civil Service Commission, from enforcing, threatening to enforce, or proceeding with charges heretofore filed against the petitioner, allegedly pursuant to Section 12 (a) of the Act of Congress of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, commonly known as the Hatch Act, 18 U. S. C. A. Section 61, L (a); and for a declaratory judgment of the invalidity of these provisions of law, and regulations incorporated into these provisions, or promulgated by the aforesaid United States Civil Service Commission, pursuant thereto.

1. Jurisdiction of this action is invoked under the provisions of Section 11-306 of the District of Columbia Code, 28 U. S. C. A. Section 380 (a); and 28 U. S. C. A. Section 400.

2 2. The plaintiff, G. Harold Wagner, is a citizen of the United States, residing at Penn Lake, Dennison Township, Luzerne County, Pennsylvania (White Haven P. O.) and is the duly elected Treasurer of the State of Pennsylvania. This position is not under any classified or unclassified Civil Service of either the United States Government or the State of Pennsylvania.

3. Defendants, Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming are individuals found, doing business, and resident in the District of Columbia, with offices at 7th and F Streets, Northwest, in the District of Columbia, and acting as the United States Civil Service Commission.

4. That on the twenty-eighth day of April, 1944, the defendants herein acting as the United States Civil Service Commission did cause to issue against the plaintiff herein a Letter of Charges, setting forth the violation of Section 12 (a) of the Hatch Act, 18 U. S. C. A. Section 61, L (a), a copy of said Letter of Charges is attached hereto, marked Exhibit "A". Further, the defendants have set the sixth day of September, 1944, at the Post Office Building, Harrisburg, Pennsylvania, as the time and place for holding a public hearing upon the said Letter of Charges.

5. Section 1a (a) of the Hatch Act, 18 U. S. C. A. Section 61, L (a) provides in part as follows:

"No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State

or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

6. Section 12 (b) of the Hatch Act, 18 U. S. C. A. Section 61, L (b) provides in part as follows:

"If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the 'Commission'). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Com-

mission that such violation warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at
4 the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency: *Provided*, that in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes. Notice of any such order shall be sent by registered mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in subsection (c), any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order."

7. That the charges preferred against the plaintiff herein, as contained in paragraphs 1, 2, 3 and 4 of the Letter of Charges, hereinbefore referred to (Exhibit "A") do not constitute a violation of Section 12 (a) of the Hatch Act, 18 U. S. C. A. 61, L (a), or any other section of the aforesaid Act, and hence, the defendants purporting to act as the United States Civil Service Commission are without jurisdiction to proceed against the plaintiff herein for the reasons hereinafter set forth:

(a) That the plaintiff by virtue of being the duly elected State Treasurer of the Commonwealth of Pennsylvania, who was elected to that office at the General Election held in November of 1940, in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania, is not subject to the provisions of Section 12 (a), or any other section of the Hatch Act, in that his duties were created by and performed in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania and the Acts of Assembly promulgated thereunder.

(b) The plaintiff's principal employment is not in any activity that is financed in whole, or in part, by loans or grants made by the United States or any Agency thereof.

8. If the defendants are permitted to proceed with the alleged Letter of Charges filed against the plaintiff and a hearing held thereon, your plaintiff is without adequate remedy at law to determine preliminarily the right of the defendants to hold a hearing upon the charges which the plaintiff avers does not constitute a violation of Section 12 (a) of the Hatch Act, hereinbefore referred to.

9. There exists no other adequate remedy at law whereby the plaintiff may presently protect his constitutional rights, of which he would be deprived if the defendants herein, purporting to act as the United States Civil Service Commission, proceeded in accordance with the provisions set forth in Section 12 (b) (18 U. S. C. A. Section 61, L (b)) of the aforesaid Hatch Act, and carrying out their intention of holding the hearing scheduled for the sixth day of September, 1944, upon the aforesaid Letter of Charges.

10. That the plaintiff is the Democratic nominee for the office of Auditor General of the State of Pennsylvania at the General Election to be held November 7, 1944, and thereby will be required to engage in political activity on his own behalf in the furtherance of his candidacy for the aforesaid office. If the defendants are permitted to pro-

ceed with the hearing scheduled for September 6, 1944 upon the Letter of Charges, he will suffer irreparable damage to himself and to his candidacy for said office, for which he has no adequate or complete remedy at law.

6 11. The second sentence of Section 12 (a) (18 U. S. C. A. Section 61, L (a)) of the aforesaid Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of a citizen of the United States to engage in political activity, which right is reserved to the people of the United States by the Ninth and Tenth Amendments.

12. Section 12 (a), 18 U. S. C. A. Section 61, L (a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employes of the various State Governments, whose principal employment is in connection with any activity which is financed in whole, or in part, by loans or grants made by the United States or any Federal Agency, and those employes of State Governments whose employment is not so financed by loans or grants from the Federal Government, in violation of the Fifth Amendment.

13. The second sentence of Section 12 (a), 18 U. S. C. A. Section 61, L (a) of the Hatch Act is repugnant to the Constitution of the United States since it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law, in violation of the Fifth Amendment.

14. That the plaintiff as a citizen of the United States, in discharge of his duties of citizenship, of his right to vote, and in exercise of his constitutional rights of freedom of speech, of the press, of assembly, and the right to engage in political activity, the said plaintiff desires to engage in the following acts: to be a candidate for public office; to write for publication letters and articles in support of candidates for office; to deliver speeches before assemblies in his own behalf and in behalf of certain candidates for Fed-

eral and State Offices; to attend and participate in meetings; to solicit votes, aid in getting out voters, initiate
7 petitions, and canvass for the signatures of others on such petitions; to contribute to his own campaign committee and campaign committees of other candidates for public office; and perform any and all acts not prohibited by any provision of law other than Section 12 (a) U. S. C. A. Section 61, L (a) of the Hatch Act hereinbefore referred to.

15. The acts of individual defendants, purporting to act as the United States Civil Service Commission in endeavoring to enforce Section 12 (a) 18 U. S. C. A. Section 61, L (a) of the Hatch Act against the plaintiff herein, are unlawful, arbitrary, and without official authority in violation of the hereinabove mentioned provisions of the Constitution of the United States and the rights of the plaintiff guaranteed thereunder. Unless the individual defendants, purporting to act as the United States Civil Service Commission, are permanently enjoined from proceeding with the scheduled hearing upon the charges that have been filed against the plaintiff, purportedly under the provisions of Section 12 (b) 18 U. S. C. A. Section 61, L (b) of the Hatch Act, the plaintiff as a candidate for public office, will be subjected to the resultant irreparable damage that will flow from the unlawful public hearing. In addition, unless the defendants are enjoined from enforcing the second sentence of Section 12 (a) 18 U. S. C. A. Section 61, L (a) of the Hatch Act, the plaintiff will be deprived of exercising his lawful rights to engage in political activity in connection with the election of State and local offices, and likewise in the forthcoming election for the offices of President and Vice-President of the United States and members of Congress. Unless the relief herein prayed for is granted, plaintiff will suffer irreparable injury for which he will have no adequate and complete remedy at law.

Wherefore, plaintiff prays that the court grant a preliminary and permanent injunction enjoining the defen-

dants, purporting to act as the United States Civil Service Commission from proceeding further with the charges filed and the hearing scheduled for the sixth day of September, 1944, at Harrisburg, Pennsylvania, and from enforcing the provisions of Section 12 (a) 18 U. S. C. A. Section 61, 8 L (a) of the Hatch Act; and, render a declaratory judgment that this Section is repugnant to the Constitution of the United States; and, that the Court grant the plaintiff such other and further relief as may be just and equitable.

/s/ Francis E. Walter
Easton, Penna.

/s/ Sydney Reuben
/s/ Frank P. Lenahan
129 Finance Building
Harrisburg, Pennsylvania

/s/ Thomas A. Farrell
Southern Building
Washington, D. C.
Attorneys for Plaintiff

State of Pennsylvania
County of Dauphin, ss.

G. Harold Wagner, being duly sworn according to law, deposes and says that he is the Plaintiff in the foregoing Complaint, and that he verily believes the facts set forth in the Complaint are true.

/s/ G. Harold Wagner

Sworn and subscribed to before me this 29th day of August, 1944.

/s/ Mary C. Purdy
(Notarial Seal) *Notary Public*

My Commission Expires at the End of next Session of Senate.

9 Filed Aug. 30, 1944

Exhibit "A"

United States of America

Before the United States Civil Service Commission
Docket No. 139

In the Matter of

G. Harold Wagner, State Treasurer of the State of Pennsylvania

and

The State of Pennsylvania

Letter of Charges

The United States Civil Service Commission being in receipt of information which warrants, under the provisions of Section 12 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61 l), hereinafter referred to as the Act, an investigation of the improper political activities of G. Harold Wagner, State Treasurer of the State of Pennsylvania, does hereby issue its Letter of Charges setting forth a summary of alleged violations, all of which occurred in the State of Pennsylvania.

Wherever the term "political party" appears in this Letter of Charges said term "political party" means a political party whose candidates for presidential electors received votes in the last preceding election at which presidential electors were selected. Wherever the term "political campaign" is used in this Letter of Charges, said term "political campaign" means the political campaign in the primary and general elections of a political party as described in the preceding sentence, unless otherwise
10 stated. Wherever the term "political management" is used in this Letter of Charges, said term "political management" means the management of the activi-

ties of a political party as defined above, unless otherwise stated.

Wherever the term "employees subject to the Act" is used in this Letter of Charges, said term "employees subject to the Act" means persons employed by the State of Pennsylvania whose principal employment was at the time of the violation in connection with an activity of the State of Pennsylvania, financed in whole or in part by loans and grants made by the United States and by a Federal agency.

It is charged:

I

That at all times herein mentioned the said G. Harold Wagner was the State Treasurer of the State of Pennsylvania and as such his principal employment with the State of Pennsylvania was in connection with state activities financed in whole and in part by loans and grants made by the United States and an agency thereof, and exercised functions in connection with such activities.

II

That subsequent to January 1, 1941, the said G. Harold Wagner did directly and indirectly advise, command, attempt to coerce, and did coerce, employees subject to the Act to contribute, lend, and pay a part of their salary and compensation to a person, agency, committee, organization, and party for political purposes.

III

That subsequent to January 1, 1941, G. Harold Wagner used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsyl-
11 vania, in the year 1944, in that he influenced employees subject to the Act and subordinate to him to aid and abet in said election by causing said employees to engage in political activity during office hours and after

office hours in furtherance of his campaign for nomination to the office of Auditor-General of the State of Pennsylvania.

IV

That subsequent to January 1, 1941, the said G. Harold Wagner used his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club who are employees of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomination and election as candidates of the Democratic Party.

All of which is in violation of Section 12 (a) and Section 15 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61).

Wherefore, the United States Civil Service Commission on this 28th day of April, 1944, issues this, its Letter of Charges, against G. Harold Wagner and the State of Pennsylvania.

THE UNITED STATES CIVIL SERVICE COMMISSION

(Sgd) ALFRED KLEIN
Acting Chief Law Officer

Seal

12 Filed Aug. 30, 1944

Injunction Affidavit

STATE OF PENNSYLVANIA
County of Dauphin, ss.

G. HAROLD WAGNER, a resident of Penn Lake, Dennison Township, Luzerne County, Pennsylvania, and being the duly elected Treasurer of the State of Pennsylvania, having been duly sworn according to law, doth depose and say that on or about the twenty-eighth day of April, 1944, Harry B. Mitchell, Lucille Foster McMillin and Arthur S.

Flemming, acting as the United States Civil Service Commission filed their Letter of Charges against your deponent; that the said Letter of Charges allege, inter alia, that your deponent did ". . . use his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club, who are employes of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomination and election as candidates of the Democratic party . . ." and that your deponent ". . . used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsylvania, in the year 1944, in that he influenced employes subject to the Act and subordinate to him to aid and abet in said election by causing said employes to engage in political activity during office hours and after office hours in furtherance of his campaign for nomination to the office of Auditor General of the State of Pennsylvania . . .", which the aforesaid Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Flemming, acting as the United States Civil Service Commission, assert is in violation of Section 12 (a) of the Hatch Act, 18 U. S. C. A. Section 61, L (a).

13 Your deponent further avers that if the defendants proceed with the hearing set for the sixth day of September, 1944, at 2:00 P. M. in the Federal Building at Harrisburg, Pennsylvania, on the charges filed against your deponent, that he would suffer, as a result thereof, irreparable injury. Further, your deponent is informed and therefore avers that the alleged political activity which your deponent engaged in was not such activity as is prohibited under Section 12 (a) of the Hatch Act, as the aforesaid Act specifically exempts elected State officials from the operation of this section of the aforesaid Act.

Your deponent further avers that his duties as Treasurer of the State of Pennsylvania are defined and imposed upon him by the Constitution of the State of Pennsylvania and the laws enacted pursuant thereto by the Pennsylvania Legislature, and that the performance of said duties is not such as would come within the provisions of the Hatch Act, since the principal employment of your deponent under the provisions of the Pennsylvania Constitution and statutes, is not in any activity that is financed in whole or in part by loans or grants made by the United States or any agency thereof to the State of Pennsylvania.

Additionally, your deponent avers that to proceed further with the Letter of Charges as filed against him, and to hold the scheduled hearing upon the said charges on the sixth day of September, 1944, would constitute a deprivation of the rights guaranteed to him under the Constitution of the United States.

/s/ G. Harold Wagner

Sworn and subscribed to before me, a Notary Public, in and for the County and State aforesaid, this 29th day of August, 1944.

/s/ Mary C. Purdy
Notary Public

(Notarial Seal)

My Commission Expires at the End of next Session of Senate.

14 Filed Aug 30. 1944

Injunction Affidavit

State of Pennsylvania
County of Dauphin, ss.

Nelson A. Bryan, a resident of Hanover Township, County of Luzerne, State of Pennsylvania, having been duly sworn according to law doth depose and say that he is the Deputy State Treasurer of the Commonwealth of Pennsylvania; that on the twenty-eighth day of April, 1944,

Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Flemming, acting as the United States Civil Service Commission filed their Letter of Charges against G. Harold Wagner, the plaintiff herein; that the said Letter of Charges allege, inter alia, that the said G. Harold Wagner did ". . . use his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club, who are employes of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomination and election as candidates of the Democratic party . . ." and that ". . . G. Harold Wagner used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsylvania, in the year 1944, in that he influenced employes subject to the Act and subordinate to him to aid and abet in said election by causing said employes to engage in political activity during office hours and after office hours in furtherance of his campaign for nomination to the office of Auditor General of the State of Pennsylvania . . .", which the defendants assert is in violation of Section 12 (a) of the Hatch Act, 18 U. S. C. A. Section 61, L (a).

Your deponent further avers that if the defendants proceed with the hearing set for the sixth day of September, 1944 at 2:00 P. M. in the Federal Building at Harrisburg, Pennsylvania, on the charges filed against the aforesaid G. Harold Wagner, the plaintiff herein, that the said plaintiff would thereby suffer irreparable injury. Further, your deponent is informed and therefore avers that the alleged political activity which the aforesaid G. Harold Wagner engaged in was not such activity as is prohibited under Section 12 (a) of the Hatch Act, as the aforesaid Act specifically exempts elected State officials from the provisions of this Section of the Act.

Your deponent further avers that he is familiar with the duties imposed by the Constitution of the State of Pennsylvania and the laws enacted by the Pennsylvania legislature thereunder upon the said G. Harold Wagner, State Treasurer of the Commonwealth of Pennsylvania, and believes that the performance of said duties is not such as would come within the provisions of the Hatch Act, since the principal employment of the said G. Harold Wagner under the provisions of the Pennsylvania Constitution and statutes is not in any activity that is financed in whole or in part by loans or grants made by the United States or any agency thereof to the State of Pennsylvania.

Additionally, your deponent avers that to proceed further with the Letter of Charges as filed against the said G. Harold Wagner and to hold the scheduled hearing upon the said charges on the sixth day of September, 1944, would constitute a deprivation of the rights guaranteed to him under the Constitution of the United States.

/s/ Nelson A. Bryan

Sworn and subscribed to before me, a Notary Public, in and for the County and State aforesaid, this 29th day of August, 1944.

/s/ Mary C. Purdy

(Notarial Seal) *Notary Public*

My Commission Expires at the End of next Session of Senate.

* * * * * * * * * *

16 Filed Sept. 25, 1944

Notice of Motions and Motions to Dismiss and for Summary Judgment

Please take notice that upon the pleadings herein, upon the affidavits submitted by plaintiff in support of his motion heretofore made for an interlocutory injunction, upon the affidavit of Lawson A. Moyer, verified the 15th day of September 1944, and upon all the proceedings heretofore

had herein, the defendants will move this Court on the 10th day of October 1944, on the opening of Court on that day or as soon thereafter as counsel can be heard (1) for a motion to dismiss the complaint herein on the ground that the Court lacks jurisdiction thereof, and (2) for a motion for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as
17 a matter of law, and on the ground that the Court lacks jurisdiction to grant the relief requested by plaintiff; and for such other and further relief as to the Court may seem just and proper.

FRANCIS M. SHEA,
Assistant Attorney General

EDWARD M. CURRAN,
United States Attorney
Attorneys for Defendants.

To: THOMAS A. FARRELL,
500 Southern Building,
Washington, D. C.,
Attorney for the Plaintiff.

* * * * * * * * * *

18 Filed Sept. 25, 1944

Affidavit in Support of Motion

City of Washington, District of Columbia, ss.

Lawson A. Moyer, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission, the members of which are the defendants in the above-entitled action. This affidavit is submitted in support of motions made by said defendants to dismiss the action and for summary judgment.

I am advised that the action is brought to enjoin the Civil Service Commission from proceeding further with the

charges filed against G. Harold Wagner, plaintiff, in said action and from enforcing the provisions of Section 12 (a) of the Act of August 2, 1939, as amended (18 U. S. C. A. 61L(a)), commonly referred to as the Hatch Act.

Under the terms of Section 12(b) of the Hatch Act, the United States Civil Service Commission is expressly charged with the duty of enforcing the provisions of Section 12(a) of that Act. Section 12(b) provides that upon the receipt of information of any violation of Section 12(a)

> which, in the opinion of the United States Civil Service Commission, warrants an investigation, the Commission shall fix a time and place for a hearing and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee, a notice setting forth a summary of the alleged violation and the place and time of such hearing.

I have caused an examination to be made of the files and records of the United States Civil Service Commission with reference to the proceedings which have been instituted by the Commission in connection with the alleged violation of Section 12(a) of the Hatch Act by G. Harold Wagner. These records establish that the provisions of Section 12 (b) of the Hatch Act have thus far in all respects been complied with by the Commission.

The records of the United States Civil Service Commission disclose that the Commission has received information which, under the provisions of Section 12 of the Hatch Act, warrants an investigation of the alleged improper political activities of G. Harold Wagner, State Treasurer of the State of Pennsylvania. Pursuant to the terms of Section 12(b) of the Hatch Act, the Civil Service Commission on April 28, 1944, issued its Letter of Charges against G. Harold Wagner and the State of Pennsylvania setting forth a summary of the alleged violations. A copy of said Letter of Charges is annexed hereto as Exhibit I.

As the aforesaid Letter of Charges demonstrates, the information in the possession of the United States Civil Service Commission indicates that G. Harold Wagner has engaged in certain political activity contrary to the provisions of the first sentence of Section 12(a) of the Hatch Act.

There is nothing in the said Letter of Charges which
20 indicates that G. Harold Wagner has violated the second sentence of Section 12(a) of the Hatch Act and none of the charges contained in the said Letter of Charges relate to a violation of the second sentence of Section 12(a) of the Hatch Act.

The records of the United States Civil Service Commission further show that G. Harold Wagner duly filed an answer to the Letter of Charges, which answer was received by the United States Civil Service Commission on May 27, 1944. A copy of said answer is annexed hereto as Exhibit II.

In said answer to the Letter of Charges, G. Harold Wagner replied to the specific charges and raised certain jurisdictional questions on which he sought a preliminary determination by the Commission. This request was carefully considered by the United States Civil Service Commission and denied, counsel for G. Harold Wagner being advised by letter under date of June 7, 1944 of the Commission's decision. A copy of said letter is annexed hereto as Exhibit III.

Under date of August 10, 1944, a notice of hearing was sent by registered mail to counsel for G. Harold Wagner and to the Governor of the State of Pennsylvania advising that the United States Civil Service Commission had fixed the hearing in connection with charges of improper political activity against G. Harold Wagner for September 6, 1944, in the Federal Courtroom, Post Office Building, Harrisburg, Pennsylvania. A copy of said notice of hearing is annexed hereto as Exhibit IV.

21 Section 12(d) of the Hatch Act authorizes the Civil Service Commission to adopt such reasonable pro-

cedure and rules and regulations as it deems necessary to execute its functions under Section 12 of the Act. In accordance with that provision such rules and regulations have been adopted by the Civil Service Commission and they are set forth in full at pp. 35-44 of the pamphlet entitled "Political Activity of Public Officers and Employees," which is prepared and published by the Civil Service Commission. A copy of said pamphlet is annexed hereto as Exhibit V.

LAWSON A. MOYER.

Subscribed and sworn to before me this 15 day of Sept., 1944.

R. E. SANDERS,
(Seal) *Notary Public of District of Columbia.*

My commission expires June 14, 1946.

Exhibit I

22 Filed Sept. 25, 1944

United States of America
Before the United States Civil Service Commission

Letter of Charges
Docket No. 139

IN THE MATTER OF G. HAROLD WAGNER, State Treasurer of the State of Pennsylvania and THE STATE OF PENNSYLVANIA.

The United States Civil Service Commission being in receipt of information which warrants, under the provisions of Section 12 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61 1), hereinafter referred to as the Act, an investigation of the improper political activities of G. Harold Wagner, State Treasurer of the State of Pennsylvania, does hereby issue its Letter of Charges setting forth a summary of alleged violations, all of which occurred in the State of Pennsylvania.

Wherever the term "political party" appears in this Letter of Charges said term "political party" means a political party whose candidates for presidential electors received votes in the last preceding election at which presidential electors were selected. Wherever the term "political campaign" is used in this Letter of Charges, said term "political campaign" means the political campaign in the primary and general elections of a political party as described in the preceding sentence, unless otherwise stated.

Wherever the term "political management" is used
23 in this Letter of Charges, said term "political management" means the management of the activities of a political party as defined above, unless otherwise stated.

Wherever the term "employees subject to the Act" is used in this Letter of Charges, said term "employees subject to the Act" means persons employed by the State of Pennsylvania whose principal employment was at the time of the violation in connection with an activity of the State of Pennsylvania, financed in whole or in part by loans and grants made by the United States and by a Federal agency.

It is charged:

I

That at all times herein mentioned the said G. Harold Wagner was the State Treasurer of the State of Pennsylvania and as such his principal employment with the State of Pennsylvania was in connection with state activities financed in whole and in part by loans and grants made by the United States and an agency thereof, and exercised functions in connection with such activities.

II

That subsequent to January 1, 1941, the said G. Harold Wagner did directly and indirectly advise, command, attempt to coerce, and did coerce, employees subject to the Act to contribute, lend, and pay a part of their salary and compensation to a person, agency, committee, organization, and party for political purposes.

III

That subsequent to January 1, 1941, G. Harold Wagner used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsylvania, in the year 1944, in that he influenced employees subject to the Act and subordinate to him to aid and abet in said election by causing said employees to engage in political activity during office hours and after office hours in furtherance of his campaign for nomination to the office of Auditor-General of the State of Pennsylvania.

IV

That subsequent to January 1, 1941, the said G. Harold Wagner used his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club who are employees of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomination and election as candidates of the Democratic Party.

All of which is in violation of Section 12(a) and Section 15 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61).

WHEREFORE, the United States Civil Service Commission on this 28th day of April, 1944, issues this, its Letter of Charges, against G. Harold Wagner and the State of Pennsylvania.

THE UNITED STATES CIVIL SERVICE COMMISSION

/s/ ALFRED KLEIN
Acting Chief Law Officer

(Seal)

Ret. Rec't No. 544666
Mailed April 29, 1944

Exhibit II

25 Filed Sept. 25, 1944

United States of America
Before the United States Civil Service Commission

LETTER OF CHARGES
Docket No. 139

In the Matter of

G. HAROLD WAGNER, State Treasurer of the State of Pennsylvania

and

THE STATE OF PENNSYLVANIA

Answer to Letter of Charges

To The United States Civil Service Commission:

For answer to the Letter of Charges in the above captioned matter, G. Harold Wagner, against whom the charges are directed, for himself, makes the following answer:

1. The averments contained in paragraph 1 of the Letter of Charges are denied, and for further answer your respondent avers that he is the duly elected Treasurer of the Commonwealth of Pennsylvania, having been elected to said office at the General Election held in the State of Pennsylvania in November of the year 1940, in accordance with the provisions of the Constitution of Pennsylvania. The duties imposed upon the said respondent are expressly set forth in the Constitution of the State of Pennsylvania and the various statutory provisions enacted pursuant thereto. His principal employment is not in any activity that is financed in whole or in part by loans or grants made by the United States or any Agency thereof.

26 2. The allegations contained in paragraph 2 of the Letter of Charges are specifically denied. The respondent, G. Harold Wagner, denies that he did directly

or indirectly advise, command, attempt to coerce, and did coerce, employees subject to the Act to contribute, lend, and pay a part of their salary and compensation to a person, agency, committee, organization, and party for political purposes. The respondent further avers that he is without knowledge of any facts upon which the allegations of paragraph 2 could in truth be based, reasonably or otherwise.

3. The allegations contained in paragraph 3 of the Letter of Charges are specifically denied. The respondent, G. Harold Wagner, denies that he used his official authority and influence for the purpose of affecting the results of the Democratic Primary election, a political party election held in the State of Pennsylvania, in the year 1944, in that he influenced employees subject to the Act and subordinate to him to aid and abet in said election by causing said employees to engage in political activity during office hours and after office hours in furtherance of his campaign for nomination to the office of Auditor General of the State of Pennsylvania. The respondent further avers that he is without knowledge of any facts upon which the allegations of paragraph 3 could in truth be based, reasonably or otherwise.

4. The allegations contained in paragraph 4 of the Letter of Charges are specifically denied. The respondent, G. Harold Wagner, denies that he used his official authority and influence for the purpose of affecting the results of political party elections held in the State of Pennsylvania in the years 1942 and 1943, in that he used his official authority and influence in causing the officers of the State Treasury Club who are employees of the Treasury Department of the State of Pennsylvania to contribute various sums of monies to various individuals seeking nomi-
27 nation and election as candidates of the Democratic Party. The respondent further avers that he is without knowledge of any facts upon which the allegations of paragraph 4 could in truth be based, reasonably or otherwise.

AND FOR FURTHER ANSWER YOUR RESPONDENT CONTENDS THAT THE UNITED STATES CIVIL SERVICE COMMISSION IS WITHOUT JURISDICTION IN THIS MATTER AND AVERS:

(a) That your respondent, by virtue of being the duly elected State Treasurer of the Commonwealth of Pennsylvania, having been elected to that office at the General Election held in the State of Pennsylvania in November of the year 1940, in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania, is advised and therefore avers that he is not subject to the provisions of the Act of Congress of August 2, 1939, as amended July 19, 1940, 54 Stat. 767, (U. S. Code, Title 18, Section 61).

(b) That your respondent avers that by virtue of the express provisions of Section 12, subsection (a), of the Act referred to herein, he, as an elective official of the Commonwealth of Pennsylvania, is exempt from the provisions of the aforesaid Act.

(c) That your respondent further avers, and is advised, that not being subject to the provisions of the Act above referred to, the allegations set forth in the Letter of Charges do not constitute as to him, a violation of the said Act, and therefore, your Honorable Commission is without jurisdiction to proceed in this matter.

(d) That the Letter of Charges filed against the respondent under Section 12(a) violates his Constitutional Rights, in that it contravenes Articles V and X of the Amendments to the Constitution of the United States.

28 WHEREFORE, your respondent, G. Harold Wagner, prays your Honorable Commission for the reasons hereinbefore set forth to determine preliminarily the question of jurisdiction and the right of your Honorable Commission to proceed against the aforesaid respondent upon the allegations contained in the Letter of Charges, and fur-

ther, that your Honorable Commission dismiss the said Letter of Charges.

/s/ G. Harold Wagner
Respondent

White Haven, Pa.
Post Office Address

/s/ Francis E. Walter
/s/ Sydney Reuben
/s/ Frank P. Lenahan
Counsel for Respondent

Exhibit III

29 I:CFPC:BM

June 7, 1944

The Honorable Francis E. Walter
House of Representatives

In Re: G. Harold Wagner, et al.
Dockets Nos. 139, 141, 142, 143, 144, 145, and 146.

Dear Congressman Walter:

Reference is herewith made to the request contained in the Answers to the Letters of Charges in the above styled cases wherein you requested the Commission to preliminarily determine the question of jurisdiction before proceeding to a hearing on the merits of the respective cases.

Please be advised that the Commission has carefully considered your request and has decided not to grant same, but to proceed under the usual procedure in such cases, that is, to consider the cases in their entirety after the hearings on the merits.

These cases will be set for hearing within the very near future and you will be given ample notice as to the time and place of hearing.

Please be advised that the Commission has not as yet received applications to practice before the Commission

from attorneys Sidney Reuben and Frank P. Lenahan, whose names also appear as attorneys for the Respondents on the Answers submitted in the above cases. Copies of this letter are enclosed herewith and it would be greatly appreciated if you would forward same to them.

By direction of the Commission:

Very respectfully,

WILLIAM C. HULL
Executive Assistant

Enclosure No. 20435

Exhibit IV

30 Filed Sept. 25, 1944

United States of America
United States Civil Service Commission

Notice of Hearing

Docket No. 139
In the Matter of
G. HAROLD WAGNER, Treasury Department
and
THE STATE OF PENNSYLVANIA

To:

Francis E. Walter, Sydney Reuben, and Frank P. Lenahan, Attorneys for G. Harold Wagner, Respondent.

The Governor of the State of Pennsylvania, Harrisburg, Pennsylvania.

You and each of you are hereby notified that the above entitled matter is set for hearing in the Federal Court Room, Post Office Building, 3rd and Walnut Streets, Harrisburg, Pennsylvania, in accordance with the following order:

It is ordered: That the hearing in the matter of G. Harold Wagner, Treasury Department, State of Pennsylvania, and the State of Pennsylvania is hereby set for hearing at

2:00 p.m. in the Federal Court Room, Post Office Building, 3rd and Walnut Streets, Harrisburg, Pennsylvania, on September 6, 1944.

Washington, D. C., August 10, 1944.

/s/ ALFRED KLEIN
Acting Chief Law Officer

Sent by registered mail
8/12/44
Registered Nos. 544732, 33, 34, and 35.

* * * * * * * * * *

121 Filed Oct. 30, 1944

Order Granting Motion to Dismiss Complaint

The defendants, Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Fleming, members of the United States Civil Service Commission, having moved the Court for an order dismissing the complaint upon the ground that the procedure prescribed by Section 12 of the Act of August 2, 1939, as amended (Hatch Act), requires all questions, both jurisdictional and substantive, arising under said Section 12 of the Act of August 1939, as amended, to be heard and determined first by the United States Civil Service Commission before resort to the courts may be had and that this Court therefore lacks jurisdiction to grant the relief requested, and

Said motion having come on to be heard the 16th day of October 1944, and having heard the arguments of counsel in open court, and upon consideration thereof, and upon consideration of the affidavit and the points and authorities of defendants in support thereof, and the affidavits and the points and authorities of plaintiff in opposition thereto, and

122 The Court having determined that it lacks jurisdiction to grant the relief requested, it is this 30th day of October 1944,

ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss the complaint be, and the same hereby is, granted, and the complaint is accordingly dismissed.

DANIEL W. O'DONOGHUE
United States Justice

No objection as to form:

.....
Attorney for Plaintiff.

BRIEF FOR APPELLEES

United States Court of Appeals

IN THE DISTRICT OF COLUMBIA

No. 8903

G. HAROLD WAGNER, APPELLANT,

v.

HARRY B. MITCHELL, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

H. GRAHAM MORISON,
Assistant Attorney General,

Of Counsel:
JOSEPH M. FRIEDMAN,
Special Assistant to the Attorney General.
LOUISE H. HUNT,
Attorney, Department of Justice.

United States Court of Appeals
for the District of Columbia

FILED JUN 1 4 19

Joseph W. Stewart
CLERK

INDEX

	Page
I. Counterstatement of the Case	1
II. Pertinent Statutes	4
III. Question Presented	10
IV. Summary of Argument	10
V. Argument	10
Point 1. The procedure prescribed in section 12 of the Hatch Act for obtaining judicial review of orders and determinations of the Civil Service Commission is exclusive	10
Point 2. Appellant's jurisdictional objections, regardless of their merit, must, under the statute, be determined in the first instance by the Civil Service Commission	16
Conclusion	20

CITATIONS

Cases:

Cover v. *Schwartz*, 133 F. 2d 541, Cert. den. 319 U. S. 748	11
Spreckles Sugar Co. v. *Wickard*, 131 F. 2d 12	11
Tennessee Consolidated Coal Co. v. *Commissioner of Internal Revenue*, 117 F. 2d 452	11
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	12
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117	12
Farley v. *Abbetmeier*, 114 F. 2d 569	12
Gorham Manufacturing Co. v. *State Tax Commission*, 266 U. S. 265	13
Lawrence et al. v. *St. Louis-San Francisco Ry. Co.* 274 U. S. 588	13
Arrow Distilleries, Inc. v. *Alexander*, 24 F. Supp. 880, Aff. per curiam 306 U. S. 615	13
Clark, et al. v. *Lindemann & Hoverson Co.*, 88 F. 2d 59	13
Associated Press v. *Herrick*, 13 F. Supp. 897	13
Order of Conductors v. *Penn. R. Co.*, 323 U. S. 166	13
Macauley v. *Waterman S.S. Corp.*, 327 U. S. 540	13
Great Lakes Dredge & Dock Co. et al. v. *Huffman*, 319 U. S. 293	13
Coffman v. *Breeze Corporations, Inc. et al.*, 323 U. S. 316	13
Alabama State Federation v. *McAdory*, 325 U. S. 450	13
Brillhart v. *Excess Ins. Co.*, 316 U. S. 491	13
United States v. *Sing Tuck*, 194 U. S. 161	14
Neustein v. *Mitchell, et al.*, 42 F. Supp. 839, Aff. 130 F. 2d 197	14, 15
Chamber of Commerce v. *Federal Trade Commission*, 280 F. 45	14
Federal Trade Commission v. *Eastman Kodak Co.*, 274 U. S. 619	16

Page

Arrow-Hart & Hegeman Electric Co. v. *Federal Trade Commission*, 291 U. S. 587 16

Statutes:

Act of August 2, 1939 (Hatch Act) (54 Stat. 767):
Sec. 12 (a) 4, 11 12, 16, 17
Sec. 12 (b) 5, 11, 12
Sec. 12 (c) 6, 10, 11, 12
Sec. 12 (d) 8
Sec. 12 (e) 9, 19
Sec. 12 (f) 10

Miscellaneous:

Article III, Sec. 2, Constitution 11
Cong. Record 76, Cong. 3rd Sess.:
p. 2340 17
p. 2342 17
pp. 2349-2350 17

United States Court of Appeals

IN THE DISTRICT OF COLUMBIA

No. 8903

G. HAROLD WAGNER, APPELLANT,

v.

HARRY B. MITCHELL, ET AL., APPELLEES

BRIEF FOR APPELLEES

I. COUNTERSTATEMENT OF THE CASE

The plaintiff appellant was the Treasurer of the Commonwealth of Pennsylvania. The defendants appellees were the duly appointed and acting members of the United States Civil Service Commission. The Civil Service Commission received information concerning improper political activity on the part of appellant which in its opinion warranted investigation.[1] In April, 1944, the U. S. Civil Service Commission pursuant to the provisions of section 12(b) of the Act of August 2, 1939, as amended, popularly known as the Hatch Act [54 Stat. 767; 18 U.S.C. 61(1)] duly forwarded a letter of charges to the appellant herein and the State of Pennsylvania in which appellant is charged[2] with having violated the first sentence of section 12(a) which provides:

> "No officer or employee of any State or local agency whose principal employment is in connec-

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[1] Affidavit Lawson A. Moyer, J. A. p. 18 (Appellant and appellees have printed a Joint Appendix references to which are designated J.A.)

[2] Letter of charges is printed J.A. p. 20.

> tion with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes."

Appellant was not charged with having violated the second sentence of section 12(a) of the Hatch Act which prohibits certain officers and employees from taking an active part in political management or in political campaigns. Appellant filed his answer to said letter of charges[3] in which he denied the charges and for further answer contended that the Civil Service Commission was without jurisdiction as "his principal employment is not in any activity that is financed in whole or in part by loans or grants made by the United States or any agency thereof" and as he came within the exception contained in the last sentence of section 12(a) of the Hatch Act which provides:

> "For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

Subsequently he and the State of Pennsylvania were notified by the Civil Service Commission that the Com-

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[3] J.A. p. 23.

mission had fixed September 6, 1944, in Harrisburg, Pennsylvania, as the date and place of hearing on the charges.

On or about August 30, 1944, appellant commenced an action for an injunction and declaratory relief in the United States District Court for the District of Columbia whereby appellant sought to enjoin the Civil Service Commission from proceeding with its scheduled hearing on the charges against him on the ground that the Commission was without jurisdiction and to have section 12(a) of the Hatch Act declared invalid as in contravention of the Constitution of the United States. In accordance with the suggestion made by the Court below, the Civil Service Commission postponed its scheduled hearing until the disposition of the proceedings in the District Court.

The defendants appellees filed a motion to dismiss the action and also requested summary judgment. The matter came on for hearing before Justice Daniel W. O'Donoghue who, on October 30, 1944, granted the motion to dismiss "upon the ground that the procedure prescribed by section 12 of the Act of August 2, 1939, as amended (Hatch Act), requires all questions, both jurisdictional and substantive, arising under said section 12 of the Act of August 1939, as amended, to be heard and determined first by the United States Civil Service Commission before resort to the courts may be had"[4] and that, therefore, the Court was without jurisdiction in the premises. Having disposed of the case on jurisdictional grounds, the Court had no occasion to, and did not, pass upon any constitutional issue or any issue as to the coverage of the Act. From this ruling appellant has appealed.

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[4] Order printed J.A. p. 28.

II. PERTINENT STATUTES

The provisions of the Hatch Act which are pertinent to the present controversy are the following: The first sentence of section 12(a) of the Hatch Act provides as follows:

> "No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes."

The second sentence of section 12(a) of the Hatch Act provides as follows:

> "No such officer or employee shall take any active part in political management or in political campaigns."

The third sentence of section 12(a) of the Hatch Act provides as follows:

> "All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

The fourth and last sentence of section 12(a) of the Hatch Act provides as follows:

> "For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the

mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

Section 12(b) of the Hatch Act, charging the Civil Service Commission with the duty of enforcing section 12(a) of the Act and prescribing the method of enforcement, provides as follows:

"If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the 'Commission'). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment

within thirty days after notice of a determination by the Commission that such violation warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency: *Provided,* That in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes. Notice of any such order shall be sent by registered mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in subsection (c), any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order."

Section 12(c) of the Hatch Act, setting forth the procedure for obtaining judicial review of the orders and determinations of the Civil Service Commission, provides as follows:

"Any party aggrieved by any determination or order of the Commission under subsection (b) may, within thirty days after the mailing of notice of such determination or order, institute proceedings

for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides; but the commencement of such proceedings shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the determination or the order complained of was made. The review by the court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may direct such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings of fact or its determination or order by reason of the additional evidence so taken and shall file with the court such modified findings, determination, or order, and any such modified findings of fact, if supported by substantial evidence, shall be conclusive. The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law. If the court determines that any such determination or order, or modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Commission with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such further proceedings as, in the opinion

of the court, the law requires. The judgment and decree of the court shall be final, subject to review by the appropriate circuit court of appeals as in other cases, and the judgment and decree of such circuit court of appeals shall be final, subject to review by the Supreme Court of the United States on certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, secs. 346 and 347). If any provision of this subsection is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted."

Section 12(d) of the Hatch Act, authorizing the Civil Service Commission to adopt rules and regulations necessary to execute its functions under section 12 of the Hatch Act provides as follows:

"The Commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The Civil Service Commission shall have power to require by subpena the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter pending, as a result of this Act, before the Commission. Any member of the Commission may sign subpenas, and members of the Commission and its examiners when authorized by the Commission may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpena, the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which

such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The Commission may order testimony to be taken by deposition in any proceeding or investigation, which as a result of this Act, is pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence before the Commission as hereinbefore provided. No person shall be excused from attending and testifying or from producing documentary evidence or in obedience to a subpena on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpena issued by it: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

Section 12(e) of the Hatch Act, provides as follows:

"The provisions of the first two sentences of subsection (a) of this section shall not apply to any officer or employee who exercises no functions in connection with any activity of a State or local agency which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."

Section 12(f) of the Hatch Act, provides as follows:

> "For the purposes of this section—
>
> (1) The term 'State or local agency' means the executive branch of any State, or of any municipality or other political subdivision of such State, or any agency or department thereof.
>
> (2) The term 'Federal agency' includes any executive department, independent establishment, or other agency of the United States (except a member bank of the Federal Reserve System)."

III. QUESTION PRESENTED

The sole question here presented is whether or not under the Hatch Act the courts have jurisdiction to determine the Civil Service Commission's jurisdiction to hear charges of improper political activity prior to a hearing and a ruling on that question by the Commission itself.

IV. SUMMARY OF ARGUMENT

Congress in section 12(c) of the Hatch Act, has defined the jurisdiction of the courts with reference to the enforcement of section 12 of the Act and has limited the jurisdiction of the courts both as to questions of law and of fact to the review of orders and determinations made by the United States Civil Service Commission. All of plaintiff's jurisdictional objections, regardless of their merit must, under the statute, be determined in the first instance by the Civil Service Commission.

V. ARGUMENT

POINT 1

The procedure prescribed in section 12 of the Hatch Act for obtaining judicial review of orders and determinations of the Civil Service Commission is exclusive

Congress in section 12(c) of the Hatch Act, has defined the jurisdiction of the courts with reference to the enforcement of section 12 of that Act and has limited

the jurisdiction of courts both as to questions of law and fact to the review of orders and determinations made by the United States Civil Service Commission. Only after the Civil Service Commission has held the hearing provided in section 12(b) of the Act and made its determination and issued its order based upon the evidence presented at such hearing, is there anything upon which the courts may properly act.

Indeed, without a final determination by the Civil Service Commission it can hardly be said that a case or controversy exists. The Commission, after hearing, might itself decide that the jurisdictional objections were well taken. The action, therefore, was premature and was properly dismissed. The absence of a case or controversy would deprive the court of jurisdiction over the instant matter for all purposes.[5]

However, it is not necessary to stress further the absence of a case or controversy. The absence of jurisdiction in the courts to entertain the instant case and to grant the relief requested is established by section 12, especially 12(c), of the Act.

In section 12 of the Act Congress, in an effort to combat certain evils which had developed in this country, prohibited certain described classes of individuals from engaging in certain types of political activity. In subsection (b) of section 12, Congress designated the United States Civil Service Commission as the agency which was to enforce the prohibitions contained in subsection (a). The procedure to be followed by the Com-

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[5] By virtue of Art. III, Sec. 2 of the Constitution, the judicial power of the United States extends only to "cases" or "controversies." Numerous decisions establish that by reason of this constitutional limitation federal courts have jurisdiction only over actual disputes between adverse parties. The federal judicial power does not extend to giving merely advisory opinions or determining moot questions or abstract propositions. *Cover* v. *Schwartz*, 133 F. 2d 541, Cert. den. 319 U. S. 748; *Spreckles Sugar Co.* v. *Wickard*, 131 F. 2d 12 (App. D. C.). Nor may constitutional questions be decided hypothetically. *Tennessee Consolidated Coal Co.* v. *Commissioner*, 117 F. 2d 452.

mission in determining whether subsection (a) had been violated and the method of enforcement by the Commission are also prescribed in subsection (b).

Subsection (c) of section 12 of the Hatch Act declares that "any party aggrieved by any determination or order of the Commission under subsection (a) may, within thirty days after the mailing of notice of such determination or order, institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such employee resides * * *"[6] It is further provided in subsection (c) that "the review by the Court shall be on the record entire, including all the evidence taken on the hearing, and shall extend to questions of fact and questions of law." Provision is also made in subsection (c) for appeals to the United States Circuit Court of Appeals and to the United States Supreme Court.

It is thus apparent that Congress in section 12 has itself fixed the path which persons in appellant's position must pursue. From this path they may not properly deviate. To sanction circumvention of the Civil Service Commission, such as appellant here seeks to accomplish, would be directly contrary to the express terms of section 12 of the Act and would result in the usurpation by the courts of the functions expressly vested in the Civil Service Commission thus frustrating the clearly expressed will and intention of Congress.

It is a well established rule, most frequently applied in suits for injunction, that a prescribed administrative remedy must be exhausted before resort may be had to judicial relief for supposed or threatened injury. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117; *Farley* v. *Abbetmeier*, 114 F. 2d 569 (App. D. C.).[7] In

[6] Appellant resides in the Commonwealth of Pennsylvania, not in the District of Columbia. (Complaint, par. 2, J. A. p. 2.)

[7] Moreover, an allegation of unconstitutionality without more is insufficient to relieve appellant from the requirement of exhaustion of administra-

the *Myers* case the employer sought to enjoin officials of the National Labor Relations Board from holding hearings on the ground that the business was not covered by the National Labor Relations Act. The Court held the injunction could not issue stating that to grant it would violate the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." The rule is one of judicial administration, not merely a rule governing the exercise of discretion. *Myers* case, *supra*, p. 51. Nor may the declaratory judgment procedure be used to circumvent the necessity of exhausting administrative remedies. *Order of Conductors* v. *Penn. R. Co.*, 323 U. S. 166; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540; *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299; *Coffman* v. *Breeze Corporations* 323 U. S. 316; *Alabama State Federation of Labor* v. *McAdory* 325 U. S. 450; *Brillhart* v. *Excess Inc. Co.* 316 U. S. 491, 494, 499.

It is plain, in the instant action, that the applicable administrative process was only in a preliminary stage. The appellant had not taken advantage of the administrative procedures available to him which are prescribed in section 12 of the Act.

Appellant argues that courts will not require a futile exhaustion of administrative remedies before resort to the courts (Br. p. 10). Assuming the validity of such argument appellant makes, and can make, no showing that a resort to the administrative remedy provided would be futile. In each of the cases cited by appellant a determination had been made by the administrative

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tive remedies. *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265; *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 274 U. S. 588, 592; *Arrow Distilleries, Inc.* v. *Alexander*, 24 F. Supp. 880 (D. C. 1938), Aff. *per curiam*, 306 U. S. 615; *Clark* v. *Lindemann & Hoverson Co.*, 88 F. (2d) 59, 60; *Associated Press* v. *Herrick*, 13 F. Supp. 897.

agency which was contested. In the instant case the Civil Service Commission has not yet had an opportunity to determine its jurisdiction.

An underlying reason for the rule of judicial administration requiring the exhaustion of prescribed administrative remedies before resort to the courts is had, is stated by the Supreme Court in *United States* v. *Sing Tuck* 194 U. S. 161. The Court, speaking through Mr. Justice Holmes, declared that "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way" (p. 168). The rule serves to preserve the advantages of a "preliminary sifting process," and to preclude efforts "to swamp the courts by a resort to them in the first instance" (p. 170).

Precisely the same issue which is here presented has been decided adversely to the appellant. In *Neustein* v. *Mitchell, et al.*, 42 F. Supp. 839 (S. D. N. Y. Jan. 7, 1942), affirmed on other grounds, 130 F. 2(d) 197 (C. C. A. 2d 1942), Judge Knox held that the Court lacked jurisdiction to enjoin the Civil Service Commission from conducting a hearing involving alleged improper political activity on the part of Neustein, although the plaintiff there claimed that the Commission lacked jurisdiction to proceed with the hearing in accordance with section 12 of the Hatch Act.[8]

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[8] The Court dismissed Neustein's complaint for want of jurisdiction. After setting forth subsection (c) of section 12 of the Hatch Act, Judge Knox stated (p. 841-842):

> "Bearing in mind these provisions of the statute, the decision of the Circuit Court of Appeals in *Chamber of Commerce* v. *Federal Trade Commission*, 8 Cir., 1922, 280 F. 45, 47, is precisely applicable. That was a suit filed originally in the Circuit Court. Petitioners therein were certain respondents against whom the Commission had previously filed a complaint. The latter complaint alleged that the Commission had reason to believe, from a preliminary investigation made by it, that these petitioners were violating the Federal Trade Commission Act, 15 U. S. C. A. Sec. 41 et seq. Petitioners thereupon made and submitted a number of motions which, upon hearing before the Commission, were denied by interlocutory order duly made and entered.

The decision of the Court in the *Neustein* case is one which is required both by the express terms of the Hatch Act itself and by a due regard for the efficient and orderly functioning of the administrative process. The only permissible way to raise and preserve all questions, including questions of jurisdiction and procedure, is, under section 12 of the Hatch Act, by raising them first with the United States Civil Service Commission and then, if necessary, having the Commission's determinations and orders reviewed by the appropriate United States District Court. The plaintiff in the in-

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"The preliminary motions referred to raised the objection, inter alia, that '(1) The Commission is without jurisdiction both of parties and of subject-matter.' Accordingly, petitioners prayed that no issue of fact be joined or evidence received as to the allegations contained in certain paragraphs of the complaint, and that the entire proceeding be dismissed.

"The court dismissed the petition for want of jurisdiction, and in its opinion made the following observations: 'The writ, as asked, partakes largely of the nature of a writ of prohibition. . . . *What is really sought by petitioners is that this court should halt inquiry at the threshold, exercising, in effect, the powers of a court of original jurisdiction, in which a cause is pending, to rule in limine upon the propriety of the action and whether it should proceed further.* . . . But it must be remembered that this court has no original jurisdiction of this nature. Its functions, under the act before us, are confined to a review of certain acts of the Federal Trade Commission, which are specifically defined by the Congress. . . . If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recommendation submitted, then it has, in effect, been constituted an original trial tribunal of controversies of this nature. This was in no wise contemplated, nor would it comport with the legitimate practical functions of a court of this nature. . . . We do not think that this language [Section 9 of the Federal Trade Commission Act, 15 U. S. C. A. Sec. 49] was intended to give the District Court jurisdiction over orders such as that now before us. It is our judgment that *neither the District Court nor this court* has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals. . . . *In cases arising under this law, injunctions to halt the taking of testimony have been uniformly denied.* . . . To halt this investigation before testimony is taken would be an invasion of the powers of the legislative and executive branches of the government. The real gist of the complaint here is that it is claimed, and with plausibility, that the chief petitioner is not subject to the jurisdiction of the . . . Commission. . . . *It may be*

stant action cannot bypass the Civil Service Commission and thus prematurely invoke the jurisdiction of the Court as he seeks to do here.

Point 2

Appellant's jurisdictional objections, regardless of their merit, must, under the statute, be determined in the first instance by the Civil Service Commission

Appellant contends that he is not subject to section 12(a) of the Hatch Act because he is an elective official and his "principal employment" is not "in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" and because the "penalty provisions" of the Hatch Act could not be enforced against him since the State of Pennsylvania could not remove him from office according to the requirements of the Act.

The Letter of Charges issued by the Civil Service Commission [9] and appellant's answer [10] show conclusively that plaintiff is charged with a violation of the *first sentence* of section 12(a) of the Act. The so-called "elective official" exception is an exception only to the second *sentence* of section 12(a).

Appellant in his brief states (Br. pp. 11, 12) that "the debate in Congress on the Hatch Act, expressly states that the legislators exempted elective officers from the Hatch Act" and quotes the following state-

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desirable that the law should provide for a preliminary review of questions of jurisdiction either by the Circuit Courts of Appeals or by the District Courts; but, in the absence of such provision, we cannot assume that power. (Italics supplied.)'

"This decision has been very frequently referred to in judicial opinions, and has been twice cited with approval by the Supreme Court. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623, 47 S. Ct. 688, 71 L. Ed. 1238; *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U. S. 587, 595, 54 S. Ct. 532, 78 L. Ed. 1007."

[9] J. A. p. 20.
[10] J. A. p. 23.

ment by Senator Hatch (Cong. Record, 76 Cong., 3rd Sess. p. 2342):

> "Mr. Hatch: Elective offi*cers* are expressly exempt."

The statement taken from its context is misleading. Senator Vandenberg had inquired, "Would the pending bill prevent the State highway commissioner of a State from running for Governor of his State while he was State highway commissioner?"[11] To which Mr. Hatch replied that it would in his State because highway commissioners in New Mexico were appointive officers and exercised no policy-making function but that the answer would depend upon the character of the duties of the official under the law of his own State. There was further debate and Senator Lucas asked[12] whether the Civil Service Commission would have power to withhold funds regardless of the provision which says that the guilty person must be discharged from employment to which Senator Hatch replied: "Elective offices are expressly exempted." A reading of the entire debate makes it clear that Senator Hatch was referring to the prohibition in the *second sentence* of section 12(a) from the operation of which the fourth and last sentence of section 12(a) "expressly exempts" elected officials. Under the plain language of the Act the exception does not apply to the first sentence. That this was Congress' intention is clear from the following statements made subsequently during the course of the debate:[13]

> "Mr. Barkley: I wish to ask the Senator one further question with respect to the new section 12. The first sentence of that section reads as follows:
>
> 'Sec. 12. (a) No officer or employee of any State or local agency who exercises any function

[11] Cong. Record 76 Cong. 3d Sess. p. 2340.
[12] Ibid. p. 2342.
[13] Ibid. pp. 2349-2350.

in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof.'

"The next sentence is the second sentence referred to later:

'No such officer or employee shall take any active part in political management or in political campaigns.'

"Then the bill proceeds to exempt certain officers, including the Governor, Lieutenant Governor, mayors of cities, heads of executive departments, and elective officers.

"I assume that the definition of the word 'officer' or 'employee' in the second sentence of the section is the same as officer or employee in line 15 at the beginning of the section. That also raises the question of what is 'official influence.'

"Governors, Lieutenant Governors, and the other officers named at the end of the subsection are exempted from the provisions of the second sentence of the section which provides that:

'No such officer or employee shall take any active part in political management or in political campaigns—'

"By which is meant that under the exemption the Governor, the Lieutenant Governor, and the other officers exempted can go out and make campaign speeches; but under the first sentence of subsection (a) of section 12 where it is provided that no officer or employee 'shall use his official authority or influence,' how does the Senator draw the distinction between the influence of a man who is out making speeches in behalf of his party or his ticket or himself even and a man who is undertaking privately to influence the result of an election? How does the Senator draw the distinction

there, and to what extent would the second sentence and the exemptions in the third sentence conflict with the first sentence in subsection (a) of section 12?

"Mr. Hatch. The exemption would not relate to the first sentence. There is a distinction between official authority and official influence."

Appellant's second contention is that he was not subject to the Act because his principal employment was not in connection with any activity which was financed in whole or in part by loans or grants made by the United States or by any Federal agency. Appellant, as State Treasurer, was custodian of all funds received in the form of grants or loans from the Federal Government as well as all funds of the Commonwealth of Pennsylvania. The question of whether his principal employment was "in connection with" a particular activity is an important question as to the coverage of the Act, but appellant's reliance on the "principal employment" exception as a basis for the instant proceeding demonstrates the wisdom of the administrative procedure established by Congress in section 12 of the Hatch Act by bringing sharply into focus the compelling considerations which require that appellant follow the orderly procedure prescribed in that section.

The question of whether plaintiff's principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency is one both of law and of fact. The question of law concerns the interpretation of the particular language employed in relation to the entire statute and particularly in relation to subsection (e) of section 12 of the Act. Moreover, under any interpretation, a basic question of fact is involved which can only be determined after a full hearing at which testimony and evidence concerning the employment of the individual concerned is in-

troduced and considered. These questions, under the statutory scheme provided by Congress in Section 12 of the Act, must first be decided by the United States Civil Service Commission. They are then subject to complete review.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the decision and order of the Court below granting appellees' motion to dismiss should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1948 793277 95